STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

MATTHEW TATARIAN and
MICHAEL KELLY,

Respondent-Appellant,

Supreme Court No. 129341
COA No. 261074
Lower Court Case No. 02-220192 PZ

vs.

PERFECTING CHURCH,

Petitioner-Appellee.

_____/

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BRIEF ON APPEAL – APPELLEE

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WHETHER THE TRIAL COURT RETAINED JURISDICTION TO GRANT RELIEF FROM THE JUDGMENT OF FORECLOSURE PURSUANT TO MCR 2.612(C) NOTWITHSTANDING THE PROVISIONS OF MCL 211.78*l*(1) AND (2)

1. Does a circuit court generally retain jurisdiction to grant relief from its own judgment of foreclosure pursuant to MCR 2.612(C) despite the language of § 78*l* of the General Property Tax Act, MCL 211.78*l*?

   The Wayne County Circuit Court did not answer this question.

   The Michigan Court of Appeals did not answer this question.

   Appellants Matthew Tatarian and Michael Kelly answer: "No."

   Appellee Perfecting Church answers: "Yes."

2. If § 78*l* of the General Property Act, MCL 211.78*l*, generally divests a circuit court of jurisdiction to grant relief from its own judgment of foreclosure pursuant to MCR 2.612(C), does the circuit court nevertheless maintain jurisdiction to grant such relief when the judgment of foreclosure was invalid because the party deprived of its property was not provided with the minimum requirements of due process as required by the federal and state constitutions?

   The Wayne County Circuit Court impliedly answered: "Yes."

   The Michigan Court of Appeals impliedly answered: "Yes."

   Appellants Matthew Tatarian and Michael Kelly answer: "No."

   Appellee Perfecting Church answers: "Yes."

WHETHER MCL 211.78*l* PERMITS A PERSON TO BE DEPRIVED OF PROPERTY WITHOUT BEING AFFORDED DUE PROCESS

3. If § 78*l* of the General Property Tax Act, MCL 211.78*l*, deprives a circuit court of jurisdiction to grant relief from its own judgment of foreclosure pursuant to MCR 2.612(C), despite the fact that the circuit court later discovers that the party deprived of its property did not receive the minimum due process required by the federal and state constitutions, does § 78*l* impermissibly allow a party to be deprived of its property without due process of law and therefore in violation of the federal and state constitutions?

   The Wayne County Circuit Court did not answer this question.

   The Michigan Court of Appeals did not answer this question in this matter, but did answer it "Yes" in *In re Wayne County Treasurer (Wayne County Treasurer v Westhaven Manor Limited Dividend Housing Association)*, 265 Mich App 285; 698 NW2d 879 (2005).

   Appellants Matthew Tatarian and Michael Kelly answer: "No."

   Appellee Perfecting Church answers: "Yes."

COUNTERSTATEMENT OF FACTS

Appellee Perfecting Church purchased two properties, commonly known as 17833 Van Dyke (the "Adjacent Lot") and 17843 Van Dyke (the property at issue, the "Property"), by the same deed on July 1, 1999, for $100,000.00. This deed was recorded on September 9, 1999, at Liber 30262, Page 11, Wayne County Records. (16b.) Perfecting Church uses these properties as parking lots for its church services. As such, these properties should ordinarily be exempt from taxation under MCL 211.7s ("houses of public worship ... are exempt from taxation"), and Perfecting Church would not expect to receive tax bills for these properties.

In October, 2003, Perfecting Church learned of an alleged tax delinquency pertaining to the Adjacent Lot when Cynthia Flowers, the general manager of Perfecting Church, saw that property in the Wayne County Foreclosure Listing. (18b.) Ms. Flowers contacted the Wayne County Treasurer's Office (the "Treasurer") and obtained the tax bill for the Adjacent Lot. (18b.) Ms. Flowers also inquired about the tax status of the Property (Tax Parcel I.D. # 15005397), but was told that the payment of the taxes due on the Adjacent Lot would cover the Property, as both properties were transferred to Perfecting Church by the same deed. (18b.) Perfecting Church, in order to avoid any possibility of a foreclosure, then paid the delinquent taxes for the Adjacent Lot. (18b, 22b.)

Despite the assurances of the Treasurer that the payment regarding Adjacent Lot would also cover the Property, a tax forfeiture and foreclosure proceeded against the Property. (20b.) No notice was ever sent to Perfecting Church of any proceedings. (17b, 30-32b.) Instead, the Treasurer missed the deed showing that Perfecting Church had acquired the property in 1999, and sent the notices to the previous owner. 20b, 30-32b. Further, the Wayne County Treasurer

posted a notice on the wrong property. (19b, 21b, 24-29b.) The result was that Perfecting Church received absolutely no notice of the foreclosure proceedings against the Property.

On March 10, 2003, the Wayne County Circuit Court entered a judgment foreclosing on the Property and hundreds of other properties in favor of the Treasurer. (22-24a.) The Property was subsequently conveyed to the Respondent-Appellants, Matthew Tatarian and Michael Kelly ("Respondents"), by a quit claim deed dated November 4, 2003, and recorded at Liber 39344, Page 136, Wayne County Records. (23b.)

On May 14, 2004, Perfecting Church filed its *Motion for Relief from Judgment of Foreclosure* in Wayne County Circuit Court, (1-15b), arguing, among other things, that the Treasurer had taken its property without due process.[1] Following a hearing on June 7, 2004, the Circuit Court determined that Perfecting Church was entitled to relief from the March 10, 2003 judgment under MCR 2.612(C). On July 7, 2004, the Circuit Court entered its order vacating the March 10, 2003 judgment of foreclosure. (17-19a.) The Certificate of Forfeiture to the Treasurer and the quitclaim deed to Respondents were also deemed null and void, leaving Perfecting Church with title to the Property. (18-19a.)

Subsequently, on July 23, 2004, Respondents sought to appeal to the Michigan Court of Appeals. The Court of Appeals dismissed the appeal on October 22, 2004 because the foreclosure action against the other properties remained outstanding. Respondents then filed an Application for Delayed Leave to Appeal on February 23, 2005. That Application was denied by the Court of Appeals on July 11, 2005, for lack of merit in the grounds presented. (20a.)

[1] This argument has therefore been preserved for appeal.

On August 22, 2005, Respondents filed their Application for Leave to Appeal to this Court. On February 24, 2006, this Court granted leave, directing the parties to brief the following issues:

> (1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to MCR 2.612(C) notwithstanding the provisions of MCL 211.78*l*(1) and MCL 211.78*l*(2); and
>
> (2) whether MCL 211.78*l* permits a person to be deprived of property without being afforded due process.

ARGUMENT

> The state has no proper interest in taking a person's property for nonpayment of taxes without proper notice and opportunity for a hearing at which the person can contest the state's right to foreclose and cure any default determined.... *By reason of the Due Process Clause it may not do so.* [*Dow v Michigan*, 396 Mich 192, 210; 240 NW2d 450 (1976) (emphasis added).]

A. Standard of Review

Questions of whether a court has subject matter jurisdiction are questions of law which are reviewed *de novo*. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). Questions of statutory construction are also reviewed *de novo*. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003). Questions involving interpretation of a court rule are treated like questions of statutory construction, and are likewise reviewed *de novo*. *CAM Const v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002).

B. Overview of Statutory Scheme

Michigan's General Property Tax Act ("GPTA"), MCL 211.1, *et seq*. was amended by 1999 PA 123 and again by 2001 PA 101 to essentially rewrite the real property tax foreclosure process.[2] The new process for tax foreclosures is generally as described in the *Amicus Brief of Michigan Department of Treasury*, pp. 3-5, and therefore need not be fully repeated herein. The content of three provisions of the GPTA should be noted.

First, § 78(2) of the GPTA, MCL 211.78(2), states as follows:

> *It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state*

[2] The GPTA has further been amended by 2003 PA 263. However, as that act did not become effective until January 5, 2004, it does not apply to this case. While the statutory citation to a few relevant portions of the statutory scheme have been altered by 2003 PA 263, the analysis in this Brief, and Appellee Perfecting Church's position, would remain the same even if 2003 PA 263 were applicable.

> *and the constitution of the United States*.... The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against the state or a political subdivision of this state *unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated.* [emphasis added].

This provision has remained unchanged since the adoption of 1999 PA 123.

At the time the petition underlying this action was filed with the Wayne County Circuit Court, § 78*i*(2) of the GPTA, MCL 211.78*i*(2), stated in relevant part:

> ... The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

Under 2003 PA 263, this language was moved to § 78*i*(10) of the GPTA, MCL 211.78*i*(10), but otherwise remains unchanged.

Finally, § 78*l* of the GPTA, MCL 211.78*l*, provides, in relevant part:

> (1) If a judgment for foreclosure is entered under section 78*k* and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78*k*, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.
>
> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

The above-quoted subsections of § 78*l* remain unchanged.

C. Section 78*l* does not generally deprive a circuit court of jurisdiction to grant relief from its own judgments of foreclosure pursuant to MCR 2.612(C).

1. By its plain language, § 78*l* does not apply to motions for relief brought pursuant to MCR 2.612(C), so there is no conflict between the statute and the court rule.

Subject-matter jurisdiction is generally defined as a court's power to hear and determine a cause or matter. *Bowie v Arder*, 441 Mich 23, 36; 490 NW2d 568 (1992). "The circuit court shall have original jurisdiction in all matters not prohibited by law ..." Const 1963, art 6, § 13. Also, "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court ..." MCL 600.605. Generally, the circuit courts retain jurisdiction to grant relief from their own judgments pursuant to MCR 2.612(C). Therefore, unless the Legislature has clearly and unequivocally divested the circuit court of jurisdiction, the circuit courts retain the power to grant relief from their own judgments of foreclosure.

Respondents claim that § 78*l* divests the circuit courts of authority over their own judgments in tax foreclosure cases. However, this is contrary to the provision's plain language. Section 78*l*(1) makes no mention of foreclosure actions brought by a foreclosing governmental unit ("FGU") at all; instead, it only addresses new actions that may be brought by a deprived party, saying, "the owner of any extinguished recorded or unrecorded interest ... shall not bring an action for possession ... but may only bring an action to recover money damages." MCL 211.78*l*(1). Thus, § 78*l* is designed to preclude new lawsuits to quiet title brought long after foreclosure has ended. Nothing in its plain language suggests that it was intended to or does prevent a circuit court from hearing a motion for relief from judgment brought within the foreclosure action itself. Perfecting Church did not file a new action, but simply sought relief

from a judgment that was improperly entered without the required due process, a challenge that is allowed under the statute.

Where, as here, there is no conflict between a court rule and a statute, no constitutional issues even need to be addressed. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). Therefore, this Court should hold that there is no conflict between the statute and the court rule, and that the Wayne County Circuit Court retained jurisdiction to grant relief from its judgment of foreclosure pursuant to MCR 2.612(C).

2. If § 78*l* conflicts with MCR 2.612(C), the terms of the court rule should control the process for motions for relief from judgment.

A court rule gives way to a statute only when the statute reflects a public policy having something as its basis other than court administration. *McDougall, supra* at 30-31. Even if this Court interprets § 78*l* to apply to motions for relief from judgment pursuant to MCR 2.612(C), this Court should find the court rule takes precedence over the statute. The Michigan Supreme Court has exclusive constitutional authority to make rules governing the practice and procedure of the courts of this State. Const 1963, art 6, § 5. Although the Legislature has exclusive authority to make substantive law, this Court maintains authority over matters of practice and procedure. *McDougall, supra* at 27.

There is no question that the circuit courts have jurisdiction to hear a petition for foreclosure, and that MCR 2.612(C) provides the ordinary procedure for challenging a circuit court's judgment that was entered without the necessary due process. Respondent's interpretation of §78*l* essentially proclaims that the procedures of MCR 2.612(C) do not apply to judgments of foreclosure. Because the Legislature lacks the authority to tamper with procedural law, § 78*l* cannot operate to nullify MCR 2.612(C) and divest a circuit court of its authority to set aside its own judgment. Therefore, this Court should find that § 78*l* does not deprive the circuit courts of

jurisdiction to grant relief from judgments pursuant to MCR 2.612(C) where the judgment was obtained in violation of the Due Process Clause.

D. Section 78*l* does not deprive the circuit courts of jurisdiction to grant relief from their own judgments of foreclosure under MCR 2.612(C) where the circuit court determines that its judgment was invalid because the deprived party was not provided with due process.

1. Perfecting Church was not provided with the minimum requirements of due process before being deprived of its property.

a. The Due Process Clause requires that the State provide a party with notice, an opportunity to be heard, and a chance to cure any default or otherwise redeem before it may deprive it of property through a tax foreclosure.

The Due Process Clause, US Const, Am XIV, § 1, states in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Michigan Constitution, Const 1963, art 1, § 17, similarly states: "No person shall ... be deprived of life, liberty or property, without due process of law." These two constitutional clauses (hereinafter jointly referred to as the "Due Process Clause") have been interpreted consistently with one another by this Court. *People v Sierb*, 456 Mich 519, 523-524; 581 NW2d 219 (1998).

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v Ordean*, 234 US 385, 394; 34 S Ct 779; 58 L Ed 1363 (1914); *Dow*, *supra* at 205. The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965); *Goldberg v Kelly*, 397 US 254, 267; 90 S Ct 1011; 25 L Ed 2d 287 (1970); *Dow*, *supra* at 205. The "opportunity to be heard" includes the right to notice of that opportunity. *Dow*, *supra* at 205. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central*

Hanover Bank & Trust Co, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950); *Dow*, *supra* at 205-206.

In *Dow*, this Court held that in the tax foreclosure setting, the Due Process Clause requires "proper notice and opportunity for a hearing at which the person can contest the state's right to foreclose and cure any defect determined." *Supra* at 210. This holding was based, in part, upon a line of cases from the United States Supreme Court. In *Sniadach v Family Finance Corp of Bay View*, 395 US 337; 89 S Ct 1820; 23 L Ed 2d 349 (1969), the Court struck down a Wisconsin statute that allowed for prejudgment garnishment of a person's wages without prior notice and a hearing. In *Fuentes v Shevin*, 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972), the Court struck down Florida and Pennsylvania replevin statutes which allowed the prejudgment seizure of property by a sheriff without notice and a hearing, even though the seizing party was required to post a bond and the deprived party could regain possession by also posting a bond. In *North Georgia Finishing, Inc v Di-Chem, Inc*, 419 US 601; 95 S Ct 719; 42 L Ed 2d 751 (1975), the Court further struck down a Georgia statute on the same grounds, despite the statutory requirement that the seizing party file a conclusory affidavit.

The Court also quoted from *North Georgia*, *supra* at 606, as follows:

> Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed [in *Fuentes*] to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession they were held to be in violation of the Fourteenth Amendment. [*Dow*, *supra* at 202].

Due process rights are more than mere abstractions to be acknowledged in principle. The United States Supreme Court has emphasized that individual violations of these rights cannot be tolerated. For example, in *Fuentes*, the Court stated that:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his

> possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property.... So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. [*Fuentes*, *supra* at 80-81.]

The *Fuentes* Court also recognized that the focus of a due process analysis is not on the actual property deprivation, but the denial of the process to which the party is entitled before that deprivation may occur.

> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit." *Coe v Armour Fertlizer Works*, 237 US 413, 424; 35 S Ct 625; 59 L Ed 1027 (1915). It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods. [*Fuentes*, *supra* at 87.]

It is, therefore, the *process itself* which is central to a due process analysis. The constitutional violation is the failure to provide that process, and, as demonstrated in Section D(1)(c) below, the restoration of that process is the only constitutional remedy for a due process violation.

These policies were reaffirmed in the U.S. Supreme Court's very recent decision in *Jones v Flowers*, ___ US ___; 126 S Ct 1708; ___ L Ed 2d ___ (2006). There, the Court found that a state that deprived a person of his real property through a tax foreclosure violated the Due Process Clause when it failed to take further steps to notify the person of the foreclosure after learning that the original mailed notice had not been received. *Jones*, *supra* at 1718. As in *Fuentes*, the failure to provide the process itself rendered the state's taking invalid.

Therefore, when the State wishes to take a person's property to satisfy his debt for delinquent taxes, it must first provide him with notice, an opportunity to be heard, and a chance to cure any default or redeem his property. Any less runs afoul of the Due Process Clause.

b. *Parratt* and *Daniels* are not controlling when the State's decision to deprive a person of his property is deliberate.

Respondents, along with their supporting *amici*, argue that despite the above, a party is not deprived of its property without due process of law when the FGU's failure to provide due process was negligent. In support of that position, they cite *Parratt v Taylor*, 451 US 527; 101 S Ct 1908; 68 L Ed 2d 420 (1981), and *Daniels v Williams*, 474 US 327; 106 S Ct 662; 88 L Ed 2d 662 (1986). According to Respondents, *Parratt* and *Daniels* hold that negligence cannot lead to a due process violation. However, the very opinions Respondents cite contradict their argument.

Parratt and *Daniels* only apply when the liberty or property deprivation itself occurs through negligence (i.e., the negligent loss of one's property or the negligent act causing a deprivation of liberty). Here, by contrast, the deprivation itself was intentional, but the failure to provide due process was negligent. This is a crucial distinction.

In *Parratt*, a prison inmate sued for money damages under 42 USC § 1983 when the prison mailroom negligently lost a hobby kit he had ordered. 451 US at 529. In *Daniels*, an inmate brought a § 1983 claim alleging that a sheriff had deprived him of liberty without due process of law when the sheriff negligently left a pillow on a prison staircase; the inmate tripped on the pillow and was injured. *Supra* at 328. Then-Justice Rehnquist wrote both opinions for the Court, stating, "We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns [central to the Due Process Clause]." *Daniels*, *supra* at 332. The Due Process Clause is primarily concerned with "deliberate decisions of government officials to deprive a person of life, liberty,

or property," and was "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels*, *supra* at 331, *quoting Hurtado v California*, 110 US 516, 527; 4 S Ct 111; 28 L Ed 232 (1884). Citing Chief Justice Marshall's oft-quoted line from *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819) ("we must never forget, that it is a *constitution* we are expounding") (emphasis in original), Justice Rehnquist clarified that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, *supra* at 332.

The United States Supreme Court distinguished *Daniels* from a hypothetical based on *Wolff v McDonnell*, 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (1974) (where the Court set forth the procedures required by the Due Process Clause before a State official may deprive a prison inmate of "good-time credits" the inmate has earned – the taking of which is a deprivation of an inmate's liberty). In the hypothetical, a State negligently failed to comply with the procedural requirements of *Wolff* before depriving an inmate of his good-time credits. *Daniels*, *supra* at 333. Justice Rehnquist distinguished such a case from the holding of *Daniels*. "We think the relevant action of the prison officials in that situation is their *deliberate decision to deprive* the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause." *Daniels*, *supra* at 333-334 (emphasis added).

Thus, the United States Supreme Court has drawn a clear distinction between deliberate and negligent deprivations of property. When a State makes no deliberate decision to deprive a person of a protected interest, but only does so through the negligent action of its official, then that deprivation does not implicate the Constitution. However, when the *decision to deprive* is *deliberate* – is *intentional* – then the Constitution is implicated even if the State negligently

failed to provide the procedural protections of the Due Process Clause. *Daniels*, *supra* at 333-334. In the case at bar, the Treasurer acted intentionally to deprive Perfecting Church of its property, and if any negligence occurred, it was only in the provision of the required process. Like the hypothetical case in *Daniels* and like *Wolff*, the case at bar is distinguishable from *Parratt* and *Daniels*, and the Due Process Clause has been violated.

c. Limiting a deprived party to an exclusive remedy for money damages does not cure the constitutional violation where a person has been deprived of its property without due process of law and the property may yet be returned.

In *Parratt* and *Daniels*, the actual deprivations – the loss of the hobby kit or the leg injury – were immediately final and could not be undone. In those and similar circumstances, the deprivations are immediately permanent and money damages must suffice.[3] Such is not the case here. Here, the real property in question has not been lost for good; it remains in the same location it has always occupied and may still be restored to its owner.[4] In cases such as this – and *Sniadach*, *Fuentes*, *North Georgia*, and *Dow* – the State's deprivation is not permanent unless and until the constitutionally-required process is provided.

The Due Process Clause's requirement of notice and a hearing is a "fundamental requisite." *Grannis*, *supra* at 394. While never addressing the question directly – perhaps because the answer has always appeared so clear – the United States and Michigan Supreme Courts have continually and consistently used firm, commanding language when requiring that the necessary process be provided *before* any deprivation can become permanent. *See Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976) ("some form of hearing is required *before* an individual is finally deprived of a property interest"); *Arnett v Kennedy*, 416 US 134,

[3] These are the cases in which a State remedy, such as tort law, may be sufficient. *Daniels*, *supra* at 333.

[4] In this case, the Wayne County Circuit Court restored title Perfecting Church, which has continued to occupy the Property.

180; 94 S Ct 1633; 40 L Ed 2d 15 (1974) (White, J.) ("The opportunity to defend one's property before it is finally taken is so basic that it hardly bears repeating."); *Board of Regents v Roth*, 408 US 564, 570 n 8; 92 S Ct 2701; 33 L Ed 2d 548 (1972) ("The constitutional requirement of opportunity for some form of hearing *before* deprivation of a protected interest..."); *Bell v Burson*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971) (the Due Process Clause provides an absolute right to an opportunity for a hearing "*before* the termination becomes effective"); *Boddie v Connecticut*, 401 US 371, 379; 91 S Ct 780; 28 L Ed 2d 113 (1971) (the Due Process Clause contains a "*root requirement* that an individual be given an opportunity for a hearing" prior to any deprivation); *Dow*, *supra* at 205 (emphasis added in all). This Court has been quite clear:

> The state has no proper interest in taking a person's property for nonpayment of taxes without proper notice and opportunity for a hearing at which the person can contest the state's right to foreclose and cure any default determined.... *By reason of the Due Process Clause it may not do so.* [*Dow*, *supra* at 210 (emphasis added).]

All of these cases have emphasized that the requirement of due process before a final deprivation occurs is not a suggestion or a preference, but is a mandatory requirement of the Constitution. Respondents, however, suggest that if the State provides an adequate monetary remedy for the failure to provide this constitutionally-required process, the due process violation is cured. That simply cannot be true for several reasons.

First, taking Respondents' proposition to its logical outcome demonstrates that it is flawed. If the State deprived someone of their property without the minimum requirements of due process, the State would simply pay the deprived party monetary damages. However, even after such a payment, the party *still* would have been deprived of their property, and they *still* never would have gotten a meaningful opportunity to challenge the deprivation itself. In other

words, the party still would have lost their property without due process of law, a continuing violation of the Due Process Clause by any interpretation.

Second, the United States Supreme Court has demonstrated that money is no remedy for the constitutionally-required process. In *Fuentes*, the Court reviewed statutes which permitted a person to be deprived of their property without a hearing so long as the party making a claim on the property filed a bond. The bond's purpose was to provide a monetary remedy should it be subsequently determined that the property was wrongfully taken and should be returned, yet had been lost or destroyed. The Court found that this bond requirement was no substitute for the required process. *Fuentes*, *supra* at 83. The Court ruled that "as a matter of constitutional principle, [the bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property," *Fuentes*, *supra* at 83. The deprived party's ability to recover the bond does not satisfy the Due Process Clause.

Third, Respondents' invocation of the State's condemnation power as an analogy is inapposite. That power allows the federal government and the states to take property for public use by giving the property owner just compensation. US Const, Am V. However, even though condemnation is a constitutional power, it must be exercised consistently with the Due Process Clause. Therefore, a party who is to be deprived of their property for a public use is entitled to notice and a hearing where they may challenge the public use and the proper compensation for the taking of their property. That compensation is provided for the *taking of the property*. Monetary damages are acceptable compensation for the *deprivation of property* by condemnation after notice and a hearing. That just compensation has no relation to a failure to provide *due process itself*, a critical distinction between a condemnation taking and the case at bar.

Fourth, the law has traditionally recognized that monetary compensation is not always adequate compensation for the loss of real property because real property is always deemed to be unique. *See, e.g., Consolidated Rail Corp v Michigan*, 976 F Supp 1085, 1089 (WD Mich 1996) (interference with the use and enjoyment of land is irreparable harm "since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute"); *Zurcher v Merveat*, 238 Mich App 267, 285; 605 NW2d 329 (2000) ("specific performance is the standard remedy for breach of real estate sale contracts, because real property's uniqueness makes monetary or 'legal' damages an inadequate substitute for the property itself"). A monetary remedy is inadequate to compensate the deprived party for the loss of its real property.

Therefore, a monetary remedy is not constitutionally satisfactory when the due process violation may yet be remedied by the restoration of the process.

2. Perfecting Church was deprived of its property without due process.

Before the FGU may validly foreclose on a person's real property, it must provide that person with notice, an opportunity to be heard, and an opportunity to redeem. *Dow*, *supra* at 210. Here, there is little question of the validity of notice because Perfecting Church had *no notice at all* of the pending foreclosure.

Perfecting Church only discovered a pending foreclosure as to the Adjacent Lot, the neighboring property to that at issue in this case, when its general manager reviewed the Wayne County Foreclosure Listing. (18b.) While resolving the discrepancy as to the Adjacent Lot, the general manager specifically inquired about the Property, but was told that any amount paid as to the Adjacent Lot would also cover the Property. (18b.) The tax bill for the Adjacent Lot was promptly paid. (18b, 22b.) At this point, Perfecting Church clearly had no notice that a tax foreclosure was pending against the Property.

Nonetheless, such a foreclosure proceeded. (20b.) Notice of the proceedings was mailed, not to Perfecting Church (whose deed had been of record since September 9, 1999, (16b)), but to the previous owners of the property. (17b, 20b, 30-32b.) Further, the Treasurer posted a notice of the pending foreclosure on the wrong property, one not owned by Perfecting Church. (19b, 21b, 24-29b.) As a result, Perfecting Church never received any type of notice that it was going to lose its property by way of a tax foreclosure.

3. The Wayne County Circuit Court retained jurisdiction to grant relief from its judgment of foreclosure, regardless of § 78*l*, when it determined that Perfecting Church had been deprived of its property without due process.

No act of this State's Legislature may authorize a violation of the Constitution. *See US v Villamonte-Marquez*, 462 US 579, 585; 103 S Ct 2573; 77 L Ed 2d 22 (1983). Therefore, in addressing the constitutional issues raised in this appeal, this Court is guided by "several well-established principles of law." *Caterpillar, Inc v Dept of Treasury, Revenue Div*, 440 Mich 400, 413; 488 NW2d 182 (1992). For example, legislation is presumed to be constitutional until proven otherwise. *Caterpillar, supra* at 413. Further, "it is the duty of the Court to give the presumption of constitutionality to a statute and construe it as constitutional unless the contrary clearly appears." *People v McQuillan*, 392 Mich 511, 536; 221 NW2d 569 (1974). Because this Court has a duty to interpret § 78*l* in a constitutional manner if possible, this Court should find that § 78*l* does not deprive circuit courts of jurisdiction to grant relief from their own judgments under MCR 2.612(C) where the deprived party was never provided with the minimum requirements of due process. To find otherwise would result in Perfecting Church being deprived of its property without due process.

The language of the GPTA itself demonstrates that the Legislature's intent was to ensure that the due process rights of persons to be deprived of their property were protected, and to save the statute from being deemed unconstitutional. Section 78(2) states:

> It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes *satisfy the minimum requirements of due process* required under the constitution of this state and the constitution of the United States ....

Further, while the failure of the FGU to comply with the notice provisions of the GPTA does not generally invalidate a foreclosure proceeding, an exception is explicitly carved out for cases in which due process is not provided:

> The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act *if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process* required under the state constitution of 1963 and the constitution of the United States. [§78*i*(2) (emphasis added).] [5]

Finally, § 78*l*(1) provides:

> *If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k*, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section. [emphasis added]

Under § 78*k*(5)(f) of the GPTA, MCL 211.78*k*(5)(f), the order extinguishing all existing recorded and unrecorded interests requires "[a] finding that those entitled to notice and an opportunity to be heard have been provided that notice and opportunity."

On the face of the statute, then, § 78*l* does not apply to situations in which the minimum due process has not been provided. First of all, because the required finding under § 78*k*(5)(f) cannot validly be made, the order foreclosing the property is itself invalid. Second, § 78*l*(1) only applies to notice required by the act, but says nothing about notice required by the Due Process Clause. Third, § 78(2) and § 78*i*(2)[6] clearly indicate the Legislature's intent to provide at least the minimum due process. Because the statute does not apply to cases where due process was

[5] Under the current version of the GPTA, this language appears in § 78*i*(10).
[6] Now § 78*i*(10).

not provided, then, it cannot act to divest the circuit courts of jurisdiction in those cases. Therefore, the circuit courts retain jurisdiction to grant relief from their own judgments under MCR 2.612(C) when they determine that the deprived party was not provided with due process before being deprived of its property.

This is the interpretation of the GPTA adopted in the Michigan Court of Appeals decision in *In re Wayne County Treasurer (Wayne County Treasurer v Westhaven Manor Limited Dividend Housing Association)*, 265 Mich App 285; 698 NW2d 879 (2005) ("*Westhaven*"). In that case, the Court of Appeals emphasized the above-quoted language from § 78(2) and § 78*i*(2), reasoning that "[c]learly, the applicable provisions of the GPTA require that interested parties, at a minimum, be provided with due process," *Westhaven, supra* at 291-292. Further, the Court held that "because of the constitutionally mandated due process protection, the GPTA further provides that any proceeding under the act conducted without due process is *invalid.* MCL 211.78*i*(2)." *Westhaven, supra* at 293 (emphasis in original). The Court then reasoned:

> If the proceeding on which an order was based is subsequently determined to be invalid, as were the foreclosure proceedings in this case, then it follows that the order itself is invalid. MCL 211.78*k*(5)(f) requires that the circuit court include in the foreclosure judgment a finding that all interested parties were afforded due process. A subsequent determination to the contrary inherently voids that finding. ... We believe that, in such a circumstance, the circuit court retains jurisdiction over the foreclosure matter and, under MCR 2.612(C), retains the ability to modify or vacate the judgment or order it issued pursuant to an invalid proceeding after finding that an interested party whose rights were adversely affected by the judgment order was not afforded minimum due process. [*Westhaven, supra* at 293].

The Court further rejected any argument that invalidation of a judgment of foreclosure could only occur in the Court of Appeals. The Court rejected this argument because § 78*k*(7) only allows appeals to be brought within 21 days of the date on which the judgment is entered. A party who has not received due process, having no notice of any of the proceedings, is also denied any notice of the judgment and its opportunity to appeal. *Westhaven, supra* at 294. The

opportunity to appeal is simply unavailable to parties who have received no notice of the proceedings, and those parties will continue to be deprived of their property without due process of law.

Finally, the *Westhaven* Court recognized that the terms of § 78*l* cannot rectify the situation. The majority stated that, if that section controlled,

> the owner of the extinguished property interest, regardless of the circumstances under which his interest was extinguished, would be limited to a cause of action in the Court of Claims for monetary damages for the notice deficiency. We simply cannot agree with such an interpretation that would deprive an interested party of its property interest without being afforded due process. Such a reading renders the statute unconstitutional. [*Westhaven*, *supra* at 295].

The Court of Appeals therefore chose to adopt the interpretation of the statute which maintained its constitutionality, and found that the circuit court retained its jurisdiction to grant relief under MCR 2.612(C) when due process was not provided. *Westhaven*, *supra* at 295.

In his concurring opinion, Judge Zahra agreed with this part of the majority's analysis.[7] Judge Zahra wrote separately only because he determined that

> the record does not indicate that [Westhaven Manor's] minimum due process rights under the state and federal constitutions were violated, and consequently the circuit court cannot rely on MCL 211.78*i*(2) to invalidate proceedings. [*Westhaven*, *supra* at 301-302].

The remainder of Judge Zahra's opinion, including his discussions of § 78*k*(6) & (7) and § 78*l* as a valid remedy, is limited to those cases, as he saw *Westhaven*, where due process is satisfied but some notice required under the statute was not provided.

Respondents assert that "it is not a solution to simply try to put the property back into the hands of the person who owned it prior to foreclosure since to do so would unconstitutionally

[7] The majority appeared to think that Judge Zahra disagreed with them regarding which courts may invalidate a proceeding when due process was not provided. *Westhaven*, *supra* at 294. However, this appears to be due to a misunderstanding of Judge Zahra's opinion or a response to an earlier draft of that opinion. As explained further below, Judge Zahra was discussing cases in which the Due Process Clause was satisfied but some statutory notice was not provided.

deprive another of a property right the legislature created." *Appellant's Brief*, p. 11. Respondents have enjoyed the full process afforded by the courts, and unlike Perfecting Church, Respondents cannot claim they were denied an opportunity to be heard.

Section 78*l*(1) should be read to exclude application to cases in which minimum due process has not been provided. This interpretation is consistent with the legislative intent as evidenced by § 78(2) and § 78*i*(2). It also preserves the constitutionality of the statute by preventing it from being applied in a manner which runs afoul of the Due Process Clause. Therefore, this Court should hold that § 78*l* does not deprive the circuit courts of jurisdiction to grant relief from their own judgments under MCR 2.612(C) when minimum due process was not provided.

E. If § 78*l* deprives the circuit courts of jurisdiction to grant relief from their own judgments under MCR 2.612(C), § 78*l* allows parties to be deprived of their property without due process of law and must be struck down as unconstitutional.

Respondents claim that "MCL 211.78*l*(1) clearly and unambiguously contemplates situations where no notice was given, yet it does not result in the divestiture of fee simple title in the foreclosing governmental unit as created by section 28k, but leaves open only a claim for money damages." *Appellant's Brief*, p. 9. If this Court agrees that § 78*l* applies even in cases where the deprived party has been denied due process, then it should hold the statute unconstitutional because it would impermissibly allow the FGU to deprive a person of its real property without due process of law.

If the above interpretation of § 78*l* were adopted, a party such as Perfecting Church would only learn of its loss after the redemption period and time for appeal had run, and would be left only a single recourse – an action for money damages in the Court of Claims. Even if that

action were successful and the party received $50,000.00 from the State,[8] it still would have been deprived of its property without due process of law. *See Dow*, *supra* at 210; *Westhaven*, *supra* at 295. No amount of money changes that fact or cures that constitutional violation.[9]

The United States Supreme Court in *Fuentes* struck down a statute that allowed for a pre-hearing deprivation so long as the depriving party posted a bond. *Supra* at 83. Were monetary damages sufficient to cure a deprivation of property without due process of law, that statute clearly would have passed muster, as the bond was intended as protection for the deprived party's interest. Instead, the Court ruled that "as a matter of constitutional principle, [the bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property." *Fuentes*, *supra* at 83. Similarly, and as a matter of constitutional principle, the monetary remedy in the Court of Claims is no replacement for Perfecting Church's due process right to notice, a hearing, and an opportunity to redeem before any deprivation of property may become final.

Therefore, should this Court adopt an interpretation of § 78*l* which deprives the circuit courts of jurisdiction to grant relief from judgments of foreclosure under MCR 2.612(C), even where the deprived party's minimum due process rights were violated, this Court should hold that § 78*l* is unconstitutional in those cases.

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[8] Or, in the case of one of the supporting *amici*, High Praise Cathedral of Faith Ministries, $5 million.

[9] The numerous § 1983 cases, such as *Parratt* and *Daniels*, where the deprived party has chosen to pursue monetary damages are not to the contrary. In those cases, because the deprivation of property is final, a monetary remedy is the only one *possible*.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Perfecting Church requests that this Court hold that the Wayne County Circuit Court retained jurisdiction to grant relief from its judgment of foreclosure pursuant to MCR 2.612(C), despite § 78*l* of the General Property Tax Act, MCL 211.78*l*.

Respectfully submitted,

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